

MOTION FILED  
APR 15 1987

No. 86-1546

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1986

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CENTRAL MACHINERY COMPANY,  
an Arizona corporation,  
Petitioner

v.

STATE OF ARIZONA,  
Respondent.

-----  
PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF ARIZONA

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MOTION FOR LEAVE TO FILE BRIEF  
AND BRIEF AMICI CURIAE OF THE  
AK-CHIN INDIAN COMMUNITY;  
BENTON UTU UTU GWAITU PAIUTE TRIBE;  
(additional amici on inside cover)  
IN SUPPORT OF PETITIONER

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April, 1987

36P.17

## AMICI

Big Lagoon Rancheria;  
Big Pine Paiute Shoshone Tribe;  
Bishop Paiute Shoshone Tribe;  
Cabazon Band of Mission Indians;  
Cahuilla Band of Indians;  
Campo Band of Mission Indians;  
Confederated Tribes of the Colville  
Reservation;  
Fort Independence Paiute Shoshone Tribe;  
Fort McDowell Mohave-Apache Indian  
Community;  
Hoopa Valley Tribe;  
La Jolla Band of Indians;  
Lone Pine Paiute Shoshone Tribe;  
Lummi Indian Tribe;  
Manzanita Band of Mission Indians;  
Mescalero Apache Tribe;  
Morongo Band of Mission Indians;  
Quechan Indian Tribe;  
Rincon Band of Mission Indians;  
Rohnerville Rancheria;  
San Pasqual Band of Mission Indians;  
Santa Ysabel Band of Mission Indians;  
Tohono O'odham Nation;  
Trinidad Rancheria;  
Ute Mountain Ute Tribe  
Viejas Band of Capitan Grande Mission  
Indians;  
White Mountain Apache Tribe

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE AK-CHIN INDIAN COMMUNITY, ET AL.....	vii
INTEREST OF THE AMICI CURIAE.....	1
SUMMARY OF REASONS FOR GRANTING THE WRIT.....	2
REASONS FOR GRANTING THE WRIT.....	4
I. THE ARIZONA SUPREME COURT ERRED IN APPLYING THIS COURT'S TEST FOR ENFORCEABILITY OF FEDERAL RIGHTS.....	4
A. State Obligations Under Preemptive Federal Indian Trust Legislation Are Not Dependent Upon Specific Statutory Standards of Enforceability or Performance.....	6
B. Indian Trust Legislation is Like Traditional Civil Rights Legislation.....	10
II. THE HOLDING THAT IMPLICIT TRIBAL RIGHTS ARE NOT ACTIONABLE UNDER 42 U.S.C. §1983 CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT.....	14
III. THE ARIZONA SUPREME COURT'S INTERPRETATION OF THE SCOPE OF §1983 CONFLICTS WITH A DECISION OF THE NEW MEXICO COURT OF APPEALS.....	18

TABLE OF CONTENTS (Cont.)

IV. THE DECISION BELOW IMPLICATES THE RIGHTS OF INDIAN TRIBES NATIONWIDE.....	20
CONCLUSION.....	21

# TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958).....	17
Board of Education v. Pico, 457 U.S. 853 (1982).....	16
California v. Cabazon Band of Mission Indians, _____ U.S. _____, 107 S.Ct. 1083 (1987).....	10, 15, 21
Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980).....	2, 6, 9, 13
Central Machinery Co. v. State of Arizona, _____ Ariz. _____, 730 P.2d 840 (Ariz. Ct. _____, App. 1985).....	7
Central Machinery Co. v. State of Arizona, _____ Ariz. _____, 730 P.2d 843 (Ariz. 1986).....	7, 14
Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978), <u>cert.</u> <u>denied</u> , 439 U.S. 965 (1978).....	19
Crawford v. Janklow, 710 F.2d 1321 (8th Cir. 1983).....	17
Illinois v. City of Milwaukee, 406 U.S. 91 (1972).....	17
Keaukaha-Panaewa Community v. Hawaiian Homes Comm'n, 739 F.2d 1467 (9th Cir. 1984).....	17
Maine v. Thiboutot, 448 U.S. 1 (1980).....	4, 5, 8
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).....	15

# TABLE OF AUTHORITIES (Cont.)

<u>CASES</u>	<u>PAGE(S)</u>
Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).....	5, 8
Montana v. Blackfeet Tribe of Indians, 471 U.S. _____, 105 S.Ct. 2399 (1985).....	15
National Farmers Union Ins. Co. v. Crow Tribe of Indians, U.S. _____, 105 S.Ct. 2447 (1985).....	17
New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).....	15
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).....	5, 8, 13
Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982).....	2, 18
Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M. Ct. App. 1986), cert. denied U.S. _____, 107 S.Ct. 423 (1986).....	19
Tennessee v. Garner, 471 U.S. 1 (1985).....	16
United States v. Washington, _____ F.2d _____ (9th Cir. 1987) Nos. 85-3908 and 85-4009 (Mar. 31, 1987).....	14
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).....	2, 12



# TABLE OF AUTHORITIES (Cont.)

<u>CASES</u>	<u>PAGE(S)</u>
White Mountain Apache Tribe v. Williams, 798 F.2d 1205 (9th Cir. 1986), <u>as amended</u> , 810 F.2d 844 (9th Cir. 1987), <u>cert. denied sub nom.</u> White Mountain Apache Tribe v. Arizona State Transp. Bd., <u>U.S. _____</u> , 107 S.Ct. 740 (1987).....	14
Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. _____, 107 S.Ct. 766 (1987).....	5, 8
Youngberg v. Romeo, 457 U.S. 307 (1982).....	16
 <u>STATUTES</u>	
25 U.S.C. §§261-264.....	Passim
25 U.S.C. §§450a-450n.....	18, 21
25 U.S.C. §465.....	19
25 U.S.C. §§721-728.....	10
25 U.S.C. §§1451-1453.....	21
25 U.S.C. §§1901-1963.....	10
26 U.S.C. §7871.....	21
28 U.S.C. §1331.....	17
33 U.S.C. §§1251-1376.....	8
33 U.S.C. §§1401-1444.....	8
42 U.S.C. §§601-644.....	8
42 U.S.C. §1437a.....	8

# TABLE OF AUTHORITIES (Cont.)

<u>STATUTES</u>	<u>PAGE(S)</u>
42 U.S.C. §1983.....	Passim
42 U.S.C. §1988.....	1, 18, 20, 22
42 U.S.C. §§6000-6010.....	8
42 U.S.C. §§8621-8629.....	17
49 U.S.C. §3(1).....	17
Pub.L. No. 86-3, 73 Stat. 4.....	17

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---

Pursuant to Rule 36.1, amici curiae  
consisting of 28 federally recognized  
Indian tribes, respectfully move this  
Court for leave to file the attached  
brief amici curiae in support of the  
Central Machinery Company's petition for  
writ of certiorari in the above-captioned  
case. Petitioner consents but respondent  
State of Arizona objects to the filing of

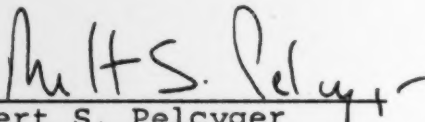
the brief of amici, and therefore, this motion is necessary.

Amici have a substantial interest in the resolution of the issues raised by petitioner in this case. The decision of the Supreme Court of Arizona seriously handicaps the ability of Indian tribes to vindicate their rights to be free from state interference with the trust relationship between Indian tribes and the federal government. The interest of the amici is described more fully in their proposed brief attached to this motion.

Amici submit the attached brief to assist in showing the Court that the issues presented by the petition are of substantial importance because they involve the construction of the scope of 42 U.S.C. §1983 and the interrelationship between that statute and the jurisdictional rights, privileges and immunities of American Indian tribes

under federal law.

Respectfully submitted,

  
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BRIEF AMICI CURIAE OF THE  
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INTEREST OF THE AMICI CURIAE

Amici curiae are 28 federally recognized Indian tribes. Some amici tribes are now seeking attorneys' fees in federal and state courts pursuant to 42 U.S.C. §§1983 and 1988. All amici are gravely concerned about the body of law holding that attorneys' fees under 42 U.S.C. §§1983 and 1988 are not available to American Indian tribes to enforce their rights under federal law designed to promote tribal self-government and

economic self-sufficiency. Amici are convinced that their ability to protect tribal rights of self-government will be severely limited by the unavailability of attorneys' fees under these statutes.

Tribal enforcement of these rights is essential because in most instances, the federal trustee, either through choice or neglect, fails to defend the integrity of the trust established by federal trust legislation. For example, the United States was not a party plaintiff in any of the cases brought by tribes in this Court to enforce preemptive trust legislation.<sup>1/</sup>

#### SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the important question of whether the Arizona Supreme

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<sup>1/</sup>E.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); Ramah Navajo School Bd, Inc. v. Bureau of Revenue, 458 U.S. 832 (1982).



Court has misapplied this Court's test for actionability of claims under federal socio-economic legislation to petitioner's claim under federal Indian trust legislation. The misapplication consisted of searching for specific statutory standards by which state conduct could be gauged, when the state's duty of non-interference under the Indian Traders Statutes could not be simpler. This duty is analogous to the states' duty under traditional civil rights legislation: in such instances, standards of performance or enforceability are irrelevant.

Additionally, the Arizona Supreme Court excluded petitioner's rights from the protections of 42 U.S.C. §1983 because of the implicitness of the rights. This is contrary to recent decisions of this Court recognizing that implicit rights are actionable under §1983.

Finally, the Arizona Supreme Court's decision directly conflicts with a decision of the New Mexico Court of Appeals in which this Court denied certiorari. The New Mexico case was correctly decided, and, unlike the Arizona Supreme Court's decision, protects the rights of Indian tribes under federal law.

#### REASONS FOR GRANTING THE WRIT

##### I. THE ARIZONA SUPREME COURT ERRED IN APPLYING THIS COURT'S TEST FOR ENFORCEABILITY OF FEDERAL RIGHTS.

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court held that 42 U.S.C. §1983, which provides civil remedies for deprivation under the color of state law of any "rights, privileges, or immunities secured by the Constitution and laws" protects all federal rights (emphasis added). The phrase "and laws" was not to be limited to a particular subset of laws.

Subsequently, the Court decided Pennhurst State School and Hospital v.

Halderman, 451 U.S. 1 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), and Wright v. City of Roanoke Redevelopment and Housing Auth., \_\_\_ U.S. \_\_\_, 107 S.Ct. 766 (1987). These cases recognize two exceptions to the holding of Thiboutot. First, rights for which Congress has provided special remedies exclusive of other remedies are not within §1983. Sea Clammers. And second, rights which are not judicially enforceable either because there is no private cause of action to enforce obligations under the statute in question, Pennhurst, or because there are no standards of enforcement or performance for the claimed rights, Wright, are not actionable under §1983.

Assuming arguendo that some federal rights are not entitled to the protections of §1983, the rights vindicated by petitioner in this case are

within the scope of §1983, because, first, there is no applicable exclusive remedial scheme; second, petitioner's right of action in this case is beyond question; and third, standards of enforcement or performance are superfluous where the state's obligation is to refrain absolutely from taxation.

A. State Obligations Under Preemptive Federal Indian Trust Legislation Are Not Dependent Upon Specific Statutory Standards of Enforceability or Performance.

In Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. at 166, this Court held that the Indian Traders Statutes, 25 U.S.C. §§261-264, preempted the imposition of a state transaction privilege tax on an on-reservation sale of tractors to a tribal enterprise. On remand, the state trial court awarded the enterprise attorneys' fees under 42 U.S.C. §1988. The state court of appeals upheld the award. Central Machinery Co. v. State of Arizona, \_\_\_\_ Ariz. \_\_\_\_, 730

P.2d 840 (Ariz. Ct. App. 1985).

Reversing the award, the Arizona Supreme Court concluded that the enterprise is not entitled to attorneys' fees for vindicating its rights under the Traders Statutes to be free from state taxation. Central Machinery Co. v. State of Arizona, \_\_\_\_ Ariz. \_\_\_\_, 730 P.2d 843 (Ariz. 1986).

The primary error of the Arizona Supreme Court was in analogizing preemptive federal Indian trust legislation to socio-economic legislation, rather than civil rights legislation. That Court found that the standards of enforceability in the Traders Statutes lacked sufficient specificity to support a finding that the State had breached an obligation actionable under 42 U.S.C. §1983. Central Machinery Co. v. State of Arizona, 730 P.2d at 851. However, the Arizona Supreme Court incorrectly applied

this Court's test for private right of enforcement of federal socio-economic legislation to petitioner's claim under the Traders Statutes.<sup>2/</sup> This Court's test was recently summarized as follows: "To create enforceable rights, federal law must specifically set out guidelines or requirements that a state agency must follow." Wright v. City of Roanoke Redevelopment and Housing Auth., 107 S.Ct. at 775.

The fallacy in the application of this test to Indian trust legislation is that it postulates the existence of an

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<sup>2/</sup>E.g., The Social Security Act, 42 U.S.C. §§601-644 (Maine v. Thiboutot); the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000-6010 (Pennhurst State School and Hospital v. Halderman); the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1376 and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§1401-1444 (Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n); and the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. §1437a (Wright v. City of Roanoke Redevelopment and Housing Auth.)

affirmative state duty, and tests the validity of the postulate by determining the existence of specific standards of enforcement or performance. This test is inapplicable when a duty of non-interference is involved as in preemptive Indian trust legislation. As this Court held, the Traders Statutes so comprehensively regulate Indian reservation commerce as to leave "no room" for state interference. Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. at 166 (emphasis added). Thus, the Arizona Supreme Court's search for specific standards in the Indian Traders Statutes by which state conduct could be gauged was fallacious.

The states' obligation under preemptive Indian trust legislation could not be simpler: absent express congressional authorization, or exceptional circumstances, states must

not interfere with reservation activities protected by such legislation. See California v. Cabazon Band of Mission Indians, \_\_\_\_ U.S. \_\_\_\_, 107 S.Ct. 1083, 1091 n.17 (1987) (in the special area of state taxation of Indian tribes and tribal members, this Court has established a per se rule of no state jurisdiction). In such instances, standards of state performance or enforcement are irrelevant.<sup>3/</sup>

**B. Indian Trust Legislation is Like Traditional Civil Rights Legislation.**

The Arizona Supreme Court's search for enforcement or performance standards

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<sup>3/</sup>Standards might become important, however, in cases in which trust legislation does impose affirmative state obligations, e.g., the Indian Child Welfare Act, 25 U.S.C. §§1901-1963 (absent good cause, states shall transfer custody and termination proceedings to tribes, and must follow specified procedures in any state proceeding); the Alabama and Coushatta Indians of Texas Termination of Federal Supervision Act, 25 U.S.C. §§721-728 (the state shall hold lands in trust for the benefit of the Indians).



was based on a misapprehension of the fundamental nature of Indian trust legislation. Trust legislation is very much like traditional civil rights legislation, which undeniably generates claims under §1983. Both types of legislation establish a protective relationship between the federal government and the rights-holder, and obligate the states not to interfere with that relationship. Like the states' duty not to interfere with civil rights, the states' duty of non-interference with tribal rights under the Traders Statutes is absolute and hence uncomplicated by statutory standards of performance or enforceability. Both types of legislation are privately enforceable.

The only difference between the two types of legislation is explicitness: foreclosure of state authority under Indian trust legislation tends to be more implicit than state obligations under

traditional civil rights legislation.

The implicitness in Indian law stems from the unique federal-tribal relationship and the unique role of Indian tribes in the federal system. As a result, there are two independent barriers to state jurisdiction over Indian tribes and members: 1) the overriding federal policy of encouraging tribal self-government, which is sometimes embodied in federal trust legislation; and 2) inherent tribal sovereignty. White Mountain Apache Tribe v. Bracker, 448 U.S. at 142. Both barriers define the limits of state power, but this Court has repeatedly stated that these limits need not be express. Id. at 144.

Both trust and civil rights legislation, however, are significantly different from federal socio-economic legislation. Typically, socio-economic laws offer funds to states in return for their assumption of certain obligations

to be performed in accordance with designated statutory standards. See, e.g., Pennhurst State School and Hospital v. Halderman, 451 U.S. at 11 (states choosing to comply with the Developmentally Disabled Assistance and Bill of Rights Act must meet the conditions set forth in the Act or forgo federal funding). On the other hand, preemptive Indian trust legislation, like civil rights legislation, removes all options and affirmative obligations from states and vests the federal government or tribes with sole regulatory authority over the legislated subject-matter. As this Court held in Central Machinery, federal regulation of Indian reservation commerce under the Traders Statutes "automatically relieved Arizona of all burdens for carrying on those same responsibilities." 448 U.S. at 164.

II. THE HOLDING THAT IMPLICIT TRIBAL RIGHTS ARE NOT ACTIONABLE UNDER 42 U.S.C. §1983 CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT.

The Arizona Supreme Court denied attorneys' fees in part because it did not view preemption claims as falling within the scope of 42 U.S.C. §1983. Central Machinery Co. v. State of Arizona, 730 P.2d at 852. See also White Mountain Apache Tribe v. Williams, 798 F.2d 1205 (9th Cir. 1986), as amended, 810 F.2d 844 (9th Cir. 1987), cert. denied sub nom. White Mountain Apache Tribe v. Arizona State Transp. Bd., \_\_\_\_ U.S. \_\_\_\_, 107 S.Ct. 740 (1987) (preemption claims generally cannot support §1983 actions); United States v. Washington, \_\_\_\_ F.2d \_\_\_\_, (9th Cir. 1987), Nos. 85-3908 and 85-4009 (Mar. 31, 1987) (tribal treaty interpretation claims do not support §1983 actions). Apparently, the rationale behind this holding was that neither state obligations nor tribal rights in the

Traders Statutes are express.

However, this Court has recognized tribal rights to be free from state interference with the protected activities as implicit corollaries of preemptive trust legislation. See, e.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (reservation commerce); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (reservation hunting and fishing); Montana v. Blackfeet Tribe of Indians, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 2399 (1985) (reservation mineral leasing); California v. Cabazon Band of Mission Indians, 107 S.Ct. at 1095 (reservation gaming). To exclude these tribal rights from the protections of §1983 solely because of their implicitness is inconsistent with decisions of this Court.

Several of this Court's decisions have recognized §1983 claims to non-enumerated constitutional rights.

For instance, in a §1983 action, local school boards were prevented from removing certain library books because the "right to receive information and ideas" is "an inherent corollary of the [explicit] rights of free speech and press." Board of Education v. Pico, 457 U.S. 853, 867 (1982). In another §1983 action, involuntarily committed mentally retarded persons were found to have an implicit right to minimally adequate or reasonable training to ensure their constitutional rights to safety and freedom from bodily restraint. Youngberg v. Romeo, 457 U.S. 307, 319 (1982). In a third §1983 action, the Fourth Amendment was held to create an implicit right to be free from apprehension by unreasonable use of deadly force. Tennessee v. Garner, 471 U.S. 1 (1985).<sup>4/</sup>

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<sup>4/</sup>Likewise, several lower courts have held that implicit rights derived from federal statutes are actionable (Continued on next page)

These cases support the principle that federal rights implicit in constitutional, statutory, or regulatory law warrant no less protection under §1983 simply because they are articulated through the judicial rather than the legislative process. See also Illinois v. City of Milwaukee, 406 U.S. 91 (1972) and National Farmers Union Ins. Co. v. Crow Tribe of Indians, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 2447 (1985) (phrase "and laws" in 28 U.S.C. §1331 includes court decisions). Accordingly, the tribal

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4/(Continued from previous page) under §1983. See, e.g., Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958) (the implied right under the Interstate Commerce Act, 49 U.S.C. §3(1), to be free from racial discrimination); Crawford v. Janklow, 710 F.2d 1321 (8th Cir. 1983) (the implied right of persons living in subsidized or public housing to assistance under the Low-Income Home Energy Assistance Act, 42 U.S.C. §§8621-8629); Keaukaha-Panaewa Community v. Hawaiian Homes Comm'n, 739 F.2d 1467 (9th Cir. 1984) (the implied right under the Hawaiian Admission Act, Pub.L. No. 86-3, 73 Stat. 5, to prevent a county from using trust lands for a flood control project).

rights articulated by this Court in construing the Indian Traders Statutes are entitled to the protections of §1983.

III. THE ARIZONA SUPREME COURT'S  
INTERPRETATION OF THE SCOPE OF  
§1983 CONFLICTS WITH A DECISION OF  
THE NEW MEXICO COURT OF APPEALS.

In Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982), this Court held that the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§450a-450n, preempted the imposition of New Mexico's gross receipts tax assessed on the construction of a tribal school. Following remand, the state trial court awarded the Indian school board attorneys' fees under 42 U.S.C. §1988 because the court concluded that the original tax exemption claim was actionable under §1983. The New Mexico Court of Appeals upheld the award, and this Court denied certiorari. Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243



(N.M. Ct. App. 1986), cert. denied \_\_\_\_  
U.S. \_\_\_\_, 107 S.Ct. 423 (1986).

The Arizona Supreme Court's decision in Central Machinery and that of the court in Ramah Navajo School Bd. are in direct conflict. Significantly, the New Mexico Court of Appeals was not troubled by the fact that tribal rights and state obligations under preemptive trust legislation are implicit. That Court held that legislation such as the Indian Self-Determination and Educational Assistance Act involved a trust relationship, created rights in tribes to control their education and self-government, and obligated states to refrain from interfering with that relationship and those rights. 720 P.2d at 1256.<sup>5/</sup> For these reasons, the

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<sup>5/</sup>See also Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978) (claim of state deprivation of rights under the Indian Reorganization Act, 25 U.S.C. §465 is actionable under §1983).

Indian claim was held to be actionable under §1983 and therefore entitled to attorneys' fees under §1988.

**IV. THE DECISION BELOW IMPLICATES THE RIGHTS OF INDIAN TRIBES NATIONWIDE.**

—The implications of the Arizona Supreme Court's decision are broad. In 1980, the State of Arizona had 152,857 Indians, more than 10% of the total Indian population in this country. But the Traders Statutes, which apply to "any person" desiring to trade on "any reservation," govern virtually all commercial activities on Indian reservations throughout the United States. Therefore, the precedent set by the Arizona Supreme Court potentially impacts tribal rights and resources nationwide.

The Arizona Supreme Court's decision is particularly damaging because the federal government recently has encouraged economic development on Indian

reservations,<sup>6/</sup> while simultaneously reducing available federal monies for that development. Therefore, to foster economic development, tribes must rely on their tax exemptions such as those under the Traders Statutes. Denying remedies for deprivations of these important federal rights contravenes congressional intent and seriously impedes the progress of Indian people.

#### CONCLUSION

Congress and this Court have long secured tribal rights from deprivation by the states. The decision of the Arizona Supreme Court is contrary to this tradition, and prejudices those Indian

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<sup>6/</sup>See the Indian Financing Act, 25 U.S.C. §§1451-1453 (1974); the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§450a-450n (1975); the Indian Tribal Governmental Tax Status Act, 26 U.S.C. §7871 (1982). See also Cabazon, 107 S.Ct. at 1092 (the congressional goal of Indian self-government includes the "overriding goal" of encouraging tribal self-sufficiency and economic development).

tribes whose access to legal assistance is essential but severely restricted by their poverty. Moreover, this Court has upheld tribal rights to state non-interference as implicit corollaries of tribal rights to political and economic self-determination.

To uphold this Court's decisions, and to properly fulfill the intent of Congress in securing tribal rights, the remedies of 42 U.S.C. §§1983 and 1988 should be available to assist in vindicating these rights. Accordingly, the petition for writ of certiorari should be granted.

April 15, 1987

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